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No. 88-2026

In the Supreme Court of the United States

OCTOBER TERM, 1989

CLEMENT J. PACYNA, PETITIONER

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

In a prior action, petitioner's claim challenging the Army's decision not to promote him to warrant officer was dismissed as time-barred. The question presented is whether the court of appeals properly affirmed the dismissal of petitioner's present action, which challenges the same decision, on the ground of *res judicata*.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is unreported. The decision of the district court (Pet. App. C1-C7) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1989. A petition for rehearing was denied on April 13, 1989. Pet. App. B1-B2. The petition for a writ of certiorari was filed on June 12, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a former Army master sergeant who voluntarily retired from active duty in 1962 after completing 20 years of military service. Pet. 13. In August

1951, while serving as a counter-intelligence agent in the Army, petitioner applied for a promotion to the position of warrant officer in the Counter-Intelligence Corps (CIC). *Ibid.* His superior officers, as well as a board of officers, recommended his selection, but the CIC ultimately declined to approve the appointment because petitioner did not meet the education requirement for the position.[1] In January 1952, petitioner's commanding officer informed him that his application had not been approved. Pet. App. D1-D2. Petitioner took no action to challenge this decision at any time between 1952 and his voluntary retirement from the Army ten years later.

Seventeen years after his retirement, in February 1979, petitioner requested and obtained his military personnel records from the Department of the Army. Pet. App. D2. The following year, on June 13, 1980, he applied to the Army Board for the Correction of Military Records (ABCMR or Board) seeking correction of his records to reflect a promotion to warrant officer retroactive to 1952. *Ibid.* The Board solicited and obtained an advisory opinion from the Judge Advocate General of the Army concerning petitioner's request. *Ibid.* That opinion, which recommended that petitioner's request be denied, was sent to petitioner for his comments. Pet. App. D2-D3.

On February 25, 1981, following a full review of petitioner's application, his response to the Judge Advocate

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[1] Under Army and CIC regulations in force at the time, an applicant for warrant officer was required to have completed two years of college or the equivalent. Gov't Br. in Opp. 2 n.1 in *Pacyna* v. *Marsh*, No. 86-1136. Petitioner left high school in the ninth grade and later obtained a high school equivalency certificate. *Ibid.* Although an applicant could request a waiver of this requirement, petitioner's records do not indicate that he made such a request. *Ibid.* Moreover, it was determined at the time that petitioner's record would not have justified the grant of an educational waiver in any event. *Ibid.*

General's opinion, his military records, and other material, the Board concluded that petitioner had failed to furnish any material evidence indicating that the 1952 decision not to promote him to warrant officer was in any way unlawful or unjust. The Board also concluded that petitioner's 28-year delay in challenging that decision made it difficult to obtain evidence concerning his claim. Pet. App. D3; Gov't Br. in Opp. 3 in *Pacyna* v. *Marsh*, No. 86-1136. Accordingly, the Board denied petitioner's application and notified him of its decision. Petitioner sought reconsideration of the Board's decision on four separate occasions, and each of these requests was denied. 86-1136 Gov't Br. 3-4.

2. On February 23, 1983, petitioner filed suit against respondent John O. Marsh, Jr., in the United States District Court for the Western District of New York. He alleged that the district court's jurisdiction was based on the Tucker Act, 28 U.S.C. 1346, the mandamus statute, 28 U.S.C. 1361, and the provision for administrative correction of military records, 10 U.S.C. 1552. Gov't C.A. App. 2. He claimed that the denial of his application for appointment represented an abuse of discretion, violated his due process rights, and was arbitrary and capricious, and that he had been denied his promotion in violation of applicable Army regulations. Gov't C.A. App. 3-4 (Complaint). He sought an order correcting his record to reflect a promotion to warrant officer in 1952, and an award of back pay retroactive to that date, including increased retirement pay. *Id.* at 5; Pet. App. D3-D4. After the government's jurisdictional challenge,[2] petitioner waived any claim to money damages in excess of $10,000 in order to preserve jurisdiction in the district court. Pet. App. D7;

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[2] See Gov't C.A. App. 19 in *Pacyna* v. *Marsh*, No. 84-6200 (2d Cir.) (Mem. in Supp. of Gov't Mot. to Dis.).

see 28 U.S.C. 1346(a)(2) (granting the district courts jurisdiction, concurrent with the Claims Court, of non-tort claims against the United States "not exceeding $10,000 in amount").

The district court granted the government's motion for summary judgment and dismissed petitioner's complaint. Pet. App. D1-D7. It held that petitioner's claim had accrued, at the latest, upon his retirement from the Army in 1962, and hence that his claim was barred by 28 U.S.C. 2401(a), which establishes a six-year statute of limitations for civil actions against the United States. Pet. App. D4-D7. The court rejected petitioner's argument that his money claim had been "revived" by the ABCMR's 1982 decision, pointing out that acceptance of this argument "would permit a plaintiff * * * to avoid the jurisdictional bar every time he submitted an application which was considered by the Board." Pet. App. D6. The court emphasized that petitioner was not seeking "to correct a discharge from dishonorable to honorable," "to expunge the judgment of a court martial," or to obtain similar relief, but rather was seeking money damages. "[I]n cases like the present one where the relief sought is money," the court concluded, "the statute of limitations is a bar if the case is untimely filed." Pet. App. D5-D6.

The United States Court of Appeals for the Second Circuit affirmed in an unpublished judgment order, and petitioner filed a petition for a writ of certiorari. In our opposition to that petition (No. 84-1706), we acknowledged that there was a jurisdictional defect in the decision below. Specifically, we noted that petitioner's complaint sought money damages and relied upon the district court's jurisdiction under 28 U.S.C. 1346; that the district court had expressly found jurisdiction under that section; and that petitioner therefore should have appealed to the United States Court of Appeals for the Federal Circuit, not the

Second Circuit. Gov't Br. in Opp. 4-5 in *Pacyna* v. *Marsh*, No. 84-1706; see 28 U.S.C. 1295(a)(2) (Federal Circuit has exclusive jurisdiction over an appeal from a final decision of a United States District Court if that court's jurisdiction was based, in whole or part, on 28 U.S.C. 1346). We suggested that the jurisdictional defect was not of sufficient importance to justify the exercise of this Court's discretionary authority to vacate the judgment of the court of appeals and order the court of appeals to transfer the case to the Federal Circuit. 84-1706 Gov't Br. 5. However, this Court granted certiorari, vacated the judgment, and remanded the case to the court of appeals "to transfer the case pursuant to 28 U.S.C. § 1631 to the United States Court of Appeals for the Federal Circuit. See 28 U.S.C. § 1295(a)(2)." *Pacyna* v. *Marsh*, 474 U.S. 1078 (1986).

The Federal Circuit unanimously affirmed the district court in an unpublished per curiam opinion. Gov't C.A. App. 7-8. It held that petitioner's claim had accrued in 1952 when he was denied appointment as a warrant officer and that his complaint was therefore barred by the six-year statute of limitations in 28 U.S.C. 2401(a). Gov't C.A. App. 7-8. The court further held that resort to review before the ABCMR does not revive a claim for money damages on which the limitations period had already run. Gov't C.A. App. 8.

Petitioner again filed a petition for a writ of certiorari. This Court denied the writ, and petitioner's subsequent request for rehearing. *Pacyna* v. *Marsh*, 481 U.S. 1048 (1987); *Pacyna* v. *Marsh*, 483 U.S. 1034 (1987).

Thereafter, petitioner filed an action in the United States Claims Court. That action was later voluntarily dismissed without prejudice. *Pacyna* v. *United States*, No. 413-87C (Cl. Ct. Nov. 9, 1987).

Subsequently, petitioner filed yet another action in the United States District Court for the Western District of New York. This time the defendants named in the complaint were respondents John O. Marsh, Jr., and John W. Matthews, in their official capacities as Secretary of the Army and Executive Secretary of the Board, and the Army Board for the Correction of Military Records. Petitioner asserted jurisdiction under 5 U.S.C. 702, 10 U.S.C. 1552, and 28 U.S.C. 1361, and also asserted that "[t]he § 702 claim has had no prior court review." Gov't C.A. App. 10.

The district court dismissed the complaint with prejudice on the ground that petitioner's claim was barred by *res judicata*. Pet. App. C1-C7. It found that "[t]he factual allegations in both complaints are virtually identical; it appears that the plaintiff copied the instant complaint from the previous one which had been prepared by an attorney. The only distinctions are the way the claim for relief is phrased and the addition of another defendant." Pet. App. C4-C5. "These distinctions," said the court, "do not change the fact that the plaintiff is again attempting to get judicial review of the same old decision by the United States Army." Pet. App. C5.

The court of appeals affirmed "substantially for the reasons stated" by the district court. Pet. App. A2. Petitioner filed a petition for rehearing with suggestion of rehearing en banc, which was denied. Pet. App. B1-B2.

ARGUMENT

1. In this, his third petition for a writ of certiorari, petitioner argues for the first time that in his original action, the district court lacked jurisdiction of his claim and, therefore, that that court's decision and all subsequent decisions rendered by any court in his cases should be vacated.

Specifically, petitioner claims that the district court did not have jurisdiction pursuant to 28 U.S.C. 1346 because (1) his promotion claim was in effect a contract claim but there was no express or implied contract between himself and the government (Pet. 7-8); (2) his claim for back and retirement pay was in effect a pension claim but Section 1346 does not grant district courts jurisdiction over claims regarding pensions (Pet. 8); and (3) no court has the power to order that former servicemembers be promoted (Pet. 9-11).

Petitioner's jurisdictional arguments are barred by the doctrine of *res judicata*. It is well settled that " '[t]he principles of *res judicata* apply to questions of [subject matter] jurisdiction as well as to other issues.' " *Underwriters Nat'l Assurance Co.* v. *North Carolina Guaranty Ass'n*, 455 U.S. 691, 706 (1982) (quoting *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 166 (1932)); see also *Insurance Corp.* v. *Compagnie des Bauxites*, 456 U.S. 694, 702 n.9 (1982); Restatement (Second) of Judgments § 12 (1982); 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4428 (1981 & Supp. 1989). As this Court explained in *Stoll* v. *Gottlieb*, 305 U.S. 165, 172 (1938), "[i]t is just as important that there should be a place to end as there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined."

Clearly, the issue of subject matter jurisdiction was litigated in petitioner's first lawsuit. Petitioner invoked jurisdiction under 28 U.S.C. 1346 in the district court. Respondent Marsh challenged that jurisdictional basis in his motion to dismiss; petitioner defended his reliance on Section 1346 in his opposition to the motion; and the district court then expressly determined that it had jurisdiction

under that provision. See Pet. App. D6-D7. After this Court ordered the case transferred to the Federal Circuit, that court affirmed the district court's judgment, thereby implicitly upholding that court's jurisdiction based on Section 1346. This Court's subsequent denial of review then rendered the matter *res judicata*. Petitioner cannot now raise his jurisdictional argument.

2. The courts below properly found that petitioner's present claim is barred by *res judicata*. In petitioner's first lawsuit, the district court determined that his challenge to the Army's 1952 decision not to promote him to warrant officer was barred by the statute of limitations. That decision is a judgment "on the merits" for *res judicata* purposes.[3] *Rose* v. *Town of Harwich*, 778 F.2d 77, 80 (1st Cir. 1985), cert. denied, 476 U.S. 1159 (1986); *PRC Harris, Inc.* v. *Boeing Co.*, 700 F.2d 894, 896 (2d Cir.), cert. denied, 464 U.S. 936 (1983); *Ellingson* v. *Burlington Northern, Inc.*, 653 F.2d 1327, 1330 n.3 (9th Cir. 1981); *Nathan* v. *Rowan*, 651 F.2d 1223, 1226 (6th Cir. 1981); *Mathis* v. *Laird*, 457 F.2d 926, 927 (5th Cir.), cert. denied, 409 U.S. 871 (1972).

The court also explicitly rejected petitioner's claim that he could escape the limitations bar for what was, essentially, a claim for money damages, by obtaining review of his records before the ABCMR in 1981 and then challenging the result of that review. Pet. App. D6-D7. As petitioner himself asserted in his second petition for certiorari

[3] For the reasons stated in our previous oppositions, the district court's decision was also correct. See generally Gov't Br. in Opp. 5-8 in *Pacyna* v. *Marsh*, No. 84-1706; 86-1136 Gov't Br. 5-8; see also 84-1706 Gov't Br. 8 n.6, and 86-1136 Gov't Br. 8 (rejecting petitioner's reliance on cases cited in previous petitions including, *e.g.*, *Hamlin* v. *United States*, 391 F.2d 941 (Ct. Cl. 1968); *Yagjian* v. *Marsh*, 571 F. Supp. 698 (D.N.H. 1983); *Kaiser* v. *Secretary of Navy*, 525 F. Supp. 1226 (D. Colo. 1981); *Mulvaney* v. *Stetson*, 470 F. Supp. 725 (N.D. Ill. 1979), cited by petitioner presently at Pet. 30).

(86-1136 Pet. 16-17, 24-25), he intended to raise a claim under 5 U.S.C. 702 in the first suit, and pressed that claim on appeal in that case and in his petition for certiorari (see 86-1136 Pet. 26-27). The court of appeals expressly affirmed the district court's holding. Gov't C.A. App. 8. This Court then reviewed and rejected petitioner's contention that the existence of his Section 702 claim affected the statutory bar posed by 28 U.S.C. 2401(a). For the reasons detailed in our opposition to the second petition (see 86-1136 Gov't Br. 8-10), that decision was correct; the doctrine of *res judicata* properly bars its reopening at this date.[4]

In any case, although petitioner now purports to be challenging solely the military board's refusal to correct his records, it is clear that he is, at bottom, still contesting the denial of promotion that occurred 37 years ago. See Pet. 35 (suggesting that this Court should remand the case to the Army Board for the Correction of Military Records because "the case is permeated with prevalent court tainted and government irresponsible actions since 1983 and Army violations of its own regulations since 1952").[5] The

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[4] Petitioner's citations to cases concerning, inter alia, claim-splitting and exhaustion of remedies (Pet. 30-32) are therefore, at this point, inapposite.

[5] Thus, in his complaint in this action, petitioner requested, inter alia,

> That the case be remanded to the Army Board for Correction of Military Records, and that the Defendants be directed to correct CLEMENT J. PACYNA'S military records, pursuant to Army Regulation 15-185 to reflect appointment as Warrant Officer in Counterintelligence Warrant Career, or as amended, in minimum grade W-1 (junior grade) initially from date of denial on January 22, 1952, and because of his exemplary service record and suffering caused him in this matter he be considered in maximum grade W-4 (chief) or an appropriate grade (W-2 or W-3 (chief)) which

purpose of *res judicata*—to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication" (*Allen* v. *McCurry*, 449 U.S. 90, 94 (1980))—was fully served by its application in this case.

3. Petitioner's claim (Pet. 8) that he was denied due process because the original district court—in a suit brought in that court by petitioner himself—entered a judgment against him without subject matter jurisdiction, is also meritless. "A fundamental requirement of due process is the 'opportunity to be heard' * * * at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). Petitioner has now litigated his 37-year-old claim in whole or in part before seven different courts. Surely, petitioner has been afforded all the process that is due.

4. A final fact counseling against a grant of certiorari in this case is the insubstantial nature of petitioner's underlying claim. He has not articulated any reason why he was entitled to a promotion in 1952 despite his lack of educational qualifications for the position of warrant officer. As the Board concluded, petitioner has not explained "why the action not to appoint him was illegal or in violation of regulations." Pet. App. D3. And, as was true in 1982, *a fortiori* in 1989, "[b]ecause of [petitioner's long]

> he would have been entitled to as a warrant officer upon his retirement in 1962, had he been appointed warrant officer while he was in the service.

Gov't C.A. App. 13-14. In his first lawsuit, petitioner requested similar relief. Specifically, he prayed that

> Plaintiff's Application for Appointment for Warrant Officer be ordered granted, and that the Defendant be directed to make payments of retirement pay, including back payments from the date Plaintiff's application was initially denied, at a rate commensurate with the retired rank of Warrant Officer."

Gov't C.A. App. 5.

* * * delay in challenging the decision made in 1952, only limited documentation is [now] available." *Ibid.* Thus, whatever action this Court were to take on the petition now before it, the end result of this litigation would be the same.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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